

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



WILLIAM T. BAIRD,)	
)	
Charging Party,)	Case No. S-CE-477
)	
V.)	PERB Decision No. 324
)	
CENTRAL UNION HIGH SCHOOL DISTRICT,)	June 30, 1983
)	
Respondent.)	

Appearances: William T. Baird, in Pro Per; Edward R. Kandler, Attorney (Breon, Galgani, Godino & O'Donnell) for Central Union High School District.

Before Gluck, Chairperson; Morgenstern and Burt, Members.

DECISION

GLUCK, Chairperson: William T. Baird excepts to the dismissal of his charge that he was unlawfully discriminated against because of his participation in activities protected by the Educational Employment Relations Act (EERA).¹ He claims that the suggestion made by the administrative law judge (ALJ) that the number of witnesses be limited in order to avoid cumulative testimony denied him the opportunity to present evidence of the Central Union High School District's (District) unlawful motive and that certain testimony adverse to his case was perjured. He requests that the hearing be reopened to permit him to produce such additional evidence.

¹EERA is codified at Government Code section 3540 et seq.

The District contends that the parties, during a pre-hearing informal conference, agreed to the ALJ's suggestion, and requests that it be awarded attorney's fees and costs incurred in defending against the charge and the instant appeal.

FACTS

William T. Baird has been an employee of the District since 1963. He has taught a variety of subjects and had served as vice principal of Central High School from February 2, 1976 to the end of the 1978-1979 academic year. In 1979, the District appointed Byron Gavrilis to the joint position of District superintendent and principal of Central High School. To afford Gavrilis the opportunity to select his own staff, the District did not renew Baird's contract as vice-principal. Baird returned to teaching full time at Central. In the fall of 1980, the District transferred Baird, under protest, to Pershing High School.

In 1979, following his return to fulltime teaching, Baird became an outspoken critic of the District's new superintendent. He criticized the new administration for alleged misuse of student body funds and disputed the superintendent's decisions to reassign an English teacher, cancel a remedial reading program and schedule driver training classes during school hours. In addition, he assisted several administrative secretaries in the filing of grievances.

In May 1980, largely because of these actions, Baird was elected president of the Central Union Faculty Association (Association), the exclusive representative of the District's teachers. At the time, he was not a member of the California Teachers Association, with which the local organization was affiliated. He continued in office only until September 23, 1980, at which time he resigned because of his transfer to Pershing.

On October 22, 1981, Gavrilis issued Baird a reprimand for failing to file a law enforcement report in response to a verbal threat made against him by a student. The reprimand accused Baird of being negligent and in possible violation of Education Code section 44014 which requires that such threats be reported. Baird contends, and the hearing officer found, that the reprimand was unjustified because Baird had not heard the threat being made.

In an effort to establish a pattern of District animus against employees engaged in protected activity, Baird presented evidence of alleged past retaliations against three other employees. Richard Mullen, an Association officer and chief negotiator, testified that in 1979, after a difficult series of negotiations, he was removed as chairman of the agriculture department and was later transferred from Central to Pershing. However, in testimony the ALJ found to be uncontroverted, Gavrilis testified that the District removed

Mullen from his position because of complaints from members of the Boosters Club, board members, students and teachers about turmoil in the agriculture department. Gavrilis further testified that one year later, the District transferred Mullen after the turmoil did not abate. Additionally, Gavrilis learned from a teacher that she was resigning primarily because of Mullen's temperament.

During the fall of 1980, Tom Flynn, a two-term president of the Association, received a letter of reprimand for leaving his classroom unsupervised. However, the record indicates that the letter was withdrawn after Gavrilis learned that Flynn had not left his study hall class unattended.

Baird also asserted that Rena Durbahn, a sometime Association activist, was involuntarily reassigned from her position as chairperson of the physical education department to a teaching position in the English department. The ALJ found that it was the uncontradicted testimony of Gavrilis that Durbahn had requested the reassignment. Durbahn was not called as a witness.

The ALJ found that Baird failed to prove that he had been disciplined for exercising protected activity. Although he concluded that Baird had not heard the student's threat made against him and that the reprimand was unjustified, he recognized that "the charging party must do more than simply show that the discipline at issue was without just cause."

Moreland Elementary School District (7/27/82) PERB Decision
No. 227.

While the ALJ did find that Baird had some "minimal" participation in protected activity, he could not conclude that such activity was a motivating factor in the District's action. He observed that the reprimand occurred more than a year after Baird had assisted in the filing of grievances for the administrative secretaries, criticized the superintendent for his various decisions and resigned as Association president and that, during the intervening period, he had not represented the Association in any meeting with the superintendent or other school official. Finding Gavrilis' offer of legitimate business justification for the District's treatment of the other activists to be uncontroverted, the ALJ did not find sufficient evidence to permit a finding of unlawful motivation.

DISCUSSION

The record is completely silent on the matter of the ALJ's alleged suggestion that the number of witnesses be limited to avoid cumulative testimony or the parties agreement to that effect.² Granting either to be the case, we find in Baird's statement of exception no basis for reversing the decision to

²Informal conferences are conducted primarily as confidential settlement proceedings and the contents of such meetings do not appear in the record of the ensuing hearing. See PERB rule 32650, codified at California Administrative Code, title 8, section 32650.

dismiss his charges or permitting him to introduce additional evidence. An order limiting cumulative evidence is proper. Witkin, California Evidence 2d, 1108. See also California Evidence Code section 352.

Testimony to establish that adverse testimony was perjured is neither "cumulative" nor repetitious and cannot be assumed to have been discouraged by the ALJ's recommendation. Assuming that Baird was concerned that Gavrilis' testimony had effectively rebutted his own evidence, he would not have been precluded from presenting other witnesses as to the same events in the belief or hope that they would be insulated from similar rejoinder. Gavrilis¹ testimony at least tended to remove the cumulative nature of such further offer of proof. In any event, Baird made no attempt to produce evidence on the basis that it would be noncumulative and has not established that any such effort on his part would have been rebuffed by the ALJ. He does not claim that the evidence he now wishes to present is newly discovered or was otherwise unavailable during the hearing. His request is denied.

Baird also excepts to the ALJ's failure to find that the District violated EERA subsection 3543.5(a)³ by its

³Subsection 3543.5(a) reads:

It shall be unlawful for a public school employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

unjustified reprimand resulting from the verbal threat incident. The ALJ applied PERB precedent holding that lack of justification for employee discipline does not of itself inevitably warrant a finding that the Act had been violated and that additional evidence may be required that the unjust discipline was motivated by anti-union animus.⁴ The record supports the ALJ's finding that Baird failed to meet his evidentiary burden.

We decline to grant the District's request for attorney's fees and costs. On its face, Baird's charge was not without arguable merit.⁵ He was aware of the various actions taken against other union activists and there is no evidence that he knew of the business justifications that Gavrilis would offer in explanation. It was not unreasonable for him, therefore, to suspect the District's motives when it reprimanded him for an incident in which he played no part.

The claim that Baird acted solely to harass the District is based on the District's reliance on hearsay information that several attorneys declined to represent Baird in these

discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

⁴Moreland Elementary School District, supra.

⁵See Chula Vista City School District (11/8/82) PERB Decision No. 256 for discussion of when attorney's fees may be awarded.

proceedings. The District neither identifies the attorneys nor offers evidence of their reasons for allegedly refusing to represent him. Rather, it simply assumes that if the attorneys declined, it was because Baird's charges were without arguable merit.⁶

Similarly, we do not find Baird's appeal patently without merit. His objection to the ALJ's proposed ruling on the matter of his reprimand was based on his own view that the absence of justification supported a finding of unlawful motive. The adverse conclusion reached by the ALJ and by this Board do not convert an arguable exception into a frivolous sortie.

ORDER

The complaint issued on the charges filed by William T. Baird against the Central Union High School District is DISMISSED in its entirety.

The request by the Central Union High School District for attorney's fees and other costs incurred in defending against the complaint and appeal from its dismissal is DENIED.

Members Morgenstern and Burt joined in this Decision.

⁶Reber v. Beckloff (4/3/70) 6 Cal.App.3d, 341 [85 Cal.Rptr. 803] relied upon by the District is clearly distinguishable. There, the court granted damages in addition to costs where the appeal was found to be frivolous because it was "obviously taken for the purpose of harassing the respondent and her attorney", had previously been litigated and adjudicated and was the sixty-fourth appeal filed on the same issues by the appellant.